Supreme Court, U.S.
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In the

# Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. 389

JEROME TREMONT,

PETITIONER,

v.

UNITED STATES,

RESPONDENT.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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*v.*

UNITED STATES,
RESPONDENT.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Petitioner Jerome Tremont respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on June 15, 1970.

### Opinion Below

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court of Massachusetts.

## Jurisdiction

The judgment of the Court of Appeals was entered on June 15, 1970. The Court of Appeals ordered a stay of mandate on June 22, 1970, pending application for certiorari. This petition for certiorari was filed within 30 days of the foregoing entry of judgment. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) and Rule 22(2) of the Supreme Court of the United States.

## Questions Presented

1. Whether before trial the government may suppress the identity of its key prosecution witness and his role as an accomplice and co-conspirator in the alleged offenses, and misrepresent in the indictment that he is "unknown."

2. Whether, in a prosecution for making false statements in an F.H.A. credit application and for conspiracy to do so, the government may refuse to specify before trial the alleged false statements, the name of the Defendant making each such statement, and the "other overt acts" alleged in the indictment.

3. Whether the government's proof, that its key prosecution witness (whose identity and role were not disclosed before trial) conspired with and was an accomplice of the Defendants, substantially enlarged the offense of conspiracy described in the indictment and constituted a fatal variance.

4. Whether there was no evidence that the Petitioner committed any offense under 18 U.S.C. § 1010.

5. Whether the trial judge may refuse to give any instruction to the jury on the theory of the defense.

## Statutory Provisions Involved

FEDERAL RULES OF CRIMINAL PROCEDURE

*Rule 7(c).* Nature and Contents. The indictment or the information shall be a plain, concise and definite writ-

ten statement of the essential facts constituting the offense charged.

*Rule 7(f).* Bill of Particulars. The court may direct the filing of a bill of particulars.

UNITED STATES CODE, TITLE 18:

§ 1010. *Federal Housing Administration Transactions*

Whoever, for the purpose of obtaining any loan or advance of credit from any person, partnership, association, or corporation with the intent that such loan or advance of credit shall be offered to or accepted by the Federal Housing Administration for insurance, or for the purpose of obtaining any extension or renewal of any loan, advance of credit, or mortgage insured by such Administration, or the acceptance, release, or substitution of any security on such loan, advance of credit, or for the purpose of influencing in any way the action of such Administration, makes, passes, utters, or publishes any statement, knowing the same to be false, or alters, forges, or counterfeits any instrument, paper, or document, or utters, publishes, or passes as true any instrument, paper, or document, knowing it to have been altered, forged, or counterfeited, or willfully overvalues any security, asset, or income, shall be fined not more than $5,000 or imprisoned not more than two years, or both.

## Statement of the Case

The jurisdiction of the district court was invoked because of an indictment and criminal prosecution instituted under criminal statutes of the United States.

The Petitioner was indicted on three counts with a co-defendant Ronald Leach for making false statements in an FHA credit application in violation of 18 U.S.C. § 1010 and for conspiring to do so in violation of 18 U.S.C. § 371. The text of the indictment was as follows:

COUNT I

> On or about May 10, 1968 . . . RONALD LEACH and JEROME TREMONT . . . for the purpose of causing a loan and advance of credit to be made by Lynn Safe Deposit and Trust Company . . . to RONALD LEACH with the intent that such loan and advance of credit would be offered to and accepted by the Department of Housing and Urban Development for insurance, and for the purpose of influencing the action of such department, did wilfully and knowingly make, pass, utter and publish and cause to be made, passed, uttered and published to said Lynn Safe Deposit and Trust Company a certain false statement in a document bearing the signature of a RONALD LEACH entitled "Federal Housing Administration Credit Application for Property Improvement Loan," said RONALD LEACH and JEROME TREMONT then knowing said statement to be false, in that said RONALD LEACH stated and certified therein that the proceeds of such loan would be used to improve the premises numbered 13 Pickman Street, Salem, in said District, whereas in truth and in fact, as said RONALD LEACH and JEROME TREMONT then knew and intended, said proceeds were not to be used to improve said premises as aforesaid; in violation of Title 18 U.S.C. 1010.

COUNT II

> On or about May 10, 1968 . . . RONALD LEACH and

JEROME TREMONT, . . . for the purpose of causing a loan and advance of credit to be made by Lynn Safe Deposit and Trust Company . . . to RONALD LEACH with the intent that such loan and advance of credit would be offered to and accepted by the Department of Housing and Urban Development for insurance, and for the purpose of influencing the action of such department, did wilfully and knowingly make, pass, utter and publish and cause to be made, passed, uttered and published to said Lynn Safe Deposit and Trust Company a certain false statement, by reason of the omission hereinafter mentioned, in a document bearing the signature of a RONALD LEACH, entitled "Federal Housing Administration Credit Application for Property Improvement Loan," said RONALD LEACH and JEROME TREMONT then knowing the same to be false in that said RONALD LEACH failed to list and set forth in said document as required a certain debt and obligation to Empire Homes, Inc. to be secured by a mortgage on premises numbered 13 Pickman Street, Salem, in said District, whereas in truth and in fact said RONALD LEACH and JEROME TREMONT then knew of such indebtedness and obligation to be secured by said mortgage; all in violation of Title 18 U.S.C. 1010.

COUNT III

From on or about April 1, 1968 to June 30, 1968 the defendants RONALD LEACH and JEROME TREMONT unlawfully, wilfully and knowingly combined, conspired, confederated, and agreed together, and with each other, and with divers other persons unknown, to commit offenses against the United States of America, in violation of Title 18 U.S.C. 1010, by unlawfully, wilfully and knowingly, making, passing, uttering and

publishing, and causing to be made, passed, uttered and published certain false statements to Lynn Safe Deposit and Trust Company, a corporation, knowing such statements to be false, for the purpose of causing certain loans and advances of credit to be made by said Lynn Safe Deposit and Trust Company, with the intent that such loans and advances of credit would be offered to and accepted by the Department of Housing and Urban Development for insurance and for the purpose of influencing the action of such department; all in violation of Title 18 U.S.C. 371.

Pursuant to the aforesaid conspiracy and to effect the object thereof the defendants did perform the following and other overt acts including the following:

*OVERT ACTS*

1. On or about May 1, 1968 JEROME TREMONT telephoned Mike S. Temkin.

2. On or about May 8, 1968, JEROME TREMONT executed a written purchase and sale agreement for the purchase of premises numbered 13 Pickman Street, Salem, Massachusetts.

3. On or about May 13, 1968 RONALD LEACH executed a note to Lynn Safe Deposit and Trust Company.

4. On or about May 20, 1968 RONALD LEACH executed a note and mortgage securing the same covering premises numbered 13 Pickman Street, Salem, Massachusetts.

5. On or about May 13, 1968 JEROME TREMONT en-

dorsed a treasurer's check of Lynn Safe Deposit and Trust Company.

6. On or about May 20, 1968 RONALD LEACH told Mike S. Temkin to prepare an estimate of cost of work to be done to premises numbered 13 Pickman Street, Salem, Massachusetts.

Prior to trial, the Petitioner and his co-defendant filed a Motion for Particulars to require the government to specify as follows:

1. The amount of the debt and the date the debt was incurred which the Government contends was not listed by Ronald Leach, as alleged in Count 2 of the indictment.

2. The date of recording and the Book and Page of the Registry where the mortgage referred to in Count 2 of the indictment is recorded.

3. The alleged false statements made by the defendants as alleged in Count 3 of the complaint.

4. The name of the particular defendant making the statement or statements referred to in Number 3 of the Particulars.

5. The "other Overt Acts" alleged in Count 3 of the indictment which were part of the conspiracy alleged therein.

The trial judge allowed only paragraphs 1 and 2 of the Motion for Particulars, and the government responded thereto but at no time supplied particulars with respect to the rest of the Motion.

The government's key witness was Kenneth B. Smith, the loan officer at the bank during the time of the offenses charged in the indictment. At the time of trial, Smith was specially on-leave from confinement at Danbury Federal Penitentiary, where he was serving concurrent 18-month, sentences for two separate convictions under 18 U.S.C. § 1010. His motions for reduction of these sentences were still pending at the time of trial. He testified that he was anxious to reduce these sentences, and that government agents had brought him to Boston from prison on several occasions for the purpose of prosecuting this case against the Petitioner and co-defendant Leach. He gave pretrial statements to the government before a stenographer, and was advised by his lawyer to testify. (Tr. 3-15 through 3-22)

Smith testified that on May 10, 1968, co-defendant Leach signed the F.H.A. credit application in question. On May 13, 1968 he gave the loan amount of $3,000 to Leach. Smith testified that he himself made certain entries in the loan application (including information about a $14,000 mortgage on the Pickman Street property for which the loan was intended), that other bank personnel supplied other information therein, and that all of the information would have been transmitted by the bank to the F.H.A. He also testified that prior to May 10, 1968 he knew that there was an F.B.I. investigation taking place, that agents were actually in the bank, that he knew the F.B.I. was investigating his loans at the time he first discussed the loan with Leach, that he told Leach and the Petitioner of this, and that because of the investigation he wanted to see Leach's tax return to make sure Leach could repay the loan.

Smith's only testimony relating to the Petitioner was (1) that Smith had agreed to make the $3,000 loan in question because he had previously talked to the Petitioner

about working for him at the National Sales Corporation in the future, (2) that the Petitioner previously told him he wanted a loan to buy into that corporation, and (3) that the Petitioner was with co-defendant Leach when Leach signed the $3,000 F.H.A. credit application in question and picked up the check therefor. (Tr. 2-98 through 2-110, 3-5, 3-7, 3-32).

Until Smith's testimony, the government at no time disclosed that Smith would attempt to testify against the Petitioner as an accomplice and co-conspirator. At the conclusion of Smith's direct examination, counsel for the Petitioner and co-defendant Leach advised the trial judge at a bench conference that Smith's testimony was "unexpected" and a surprise, and requested an early afternoon recess for that reason. (Tr. 2-115). During the Petitioner's attempt at cross-examination of Smith on the following morning, the trial judge excluded and struck questions on 55 pending indictments against Smith in state courts and whether he had psychiatric treatment. (Tr. 3-47, 3-58, 3-59).

Of the 7 prosecution witnesses, only Smith testified to any facts which in any way associated the Petitioner with offenses committed by co-defendant Leach, and even Smith did not testify that the Petitioner committed any such offenses directly or indirectly. Five of the prosecution witnesses never even met the Petitioner and did not testify to anything he did or failed to do at all. The remaining prosecution witness's testimony (Mike S. Temkin) had nothing to do with any acts or omissions of the Petitioner with respect to the offenses charged, but merely confirmed the government's own documentary evidence that the Petitioner executed a purchase and sale agreement to buy the Pickman Street property, changed his mind, and introduced co-defendant Leach to the property with the result

that Leach bought it and sought the $3,000 F.H.A. insured loan for himself. (Tr. 2-17 through 2-68; Ex. 11, 15, 21).

There was no testimony or documentary evidence that the Petitioner signed, contributed to or filled in any part of the F.H.A. credit application alleged in the indictment. The only evidence was that the application was signed by co-defendant Leach and completed by Leach and prosecution witness Smith for the purpose of a loan to Leach, not the Petitioner, and that the bank check for the loan was made out only to Leach (Ex. 1 and 3).

In addition to the foregoing, in the course of trial and in his requests for instructions the Petitioner set out the theory of his defense, that (1) the Petitioner was not present at the bank with prosecution witness Smith and co-defendant Leach when the F.H.A. credit application was filled out, (2) the Petitioner's handwriting does not even appear on the application, (3) prosecution witness Smith was given all necessary information called for in the application, and (4) the Petitioner did not pick up the check for the loan. However, the trial judge did not at any time instruct the jury as to the theory of the defense or mention any evidence favorable to the Petitioner, although he commented at length about evidence favorable to the government. (Tr. 5-2 through 5-34).

At the close of the evidence, the Petitioner moved for judgment of acquittal, which was denied. The jury found both the Petitioner and co-defendant Leach guilty on all three counts. The Petitioner moved for a new trial, which was denied. The trial judge sentenced the Petitioner to 2 years' imprisonment and to a $5,000 fine on Count I, to 2 years' imprisonment on Count II, and to 2 years' imprisonment on Count III, the sentences on Counts II and III to run concurrently with that imposed for Count I.

## Reasons for Granting the Writ

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS, CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT, AND CALLS FOR THE EXERCISE OF THIS COURT'S SUPERVISORY POWER AS TO (a) THE GOVERNMENT'S PRETRIAL SUPPRESSION OF AND MISREPRESENTATION AS TO ACCOMPLICE INFORMATION, AND (b) THE PROPER APPLICATION OF RULES 7(c) AND 7(f) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

The decision below presents a question of great importance with respect to how far the government may employ pretrial non-disclosure and misrepresentation to deprive the accused of sufficient information to prepare a meaningful defense and avoid unfair surprise at trial. The question involves not only unfairness to the accused, but also reprehensible conduct by the government.

The opinion below recognizes that the function of a bill of particulars is to provide the accused with sufficient detail of the charges against him to enable him to prepare his defense and avoid prejudicial surprise at trial. It also acknowledges that the 1966 amendment to Rule 7(f) was intended to liberalize discovery. However, it condones the action of the government and trial court in refusing to permit such discovery.

The court's reasoning is that the Petitioner should have known that the government would produce prosecution witness Smith and that he should have expected him to testify as he did. Such reasoning erroneously presumes the Petitioner's guilt despite the usual presumption of innocence. Further, the decision penalizes the Petitioner for his "rigorous cross examination" of Smith. Had he chosen to conduct no examination, or if it were not "rigorous," then presumably the Petitioner would have been

better off. But surely his attempt to make the most of an unfair trial cannot be used against him. In any event, the record clearly shows that the Petitioner was so surprised by Smith's accomplice testimony that he had to approach the bench and request a recess (Tr. 2-115).

In similar fashion, the decision condones an indictment which charges the Petitioner only in generalities and broad phrases like "other overt acts" without specification. It condones the government's deliberate deception and misrepresentation in the indictment that the Petitioner conspired with "persons unknown" while the government was working with a confessed accomplice and co-conspirator whom it intended to use as the key prosecution witness but never disclosed until trial. At the same time, it condones the government's refusal to specify what the alleged false statements were, who made them, and what the alleged "other overt acts" were.

In these ways the decision below conflicts with the combined purpose of Rules 7(c) and 7(f) of the Federal Rules of Criminal Procedure. While Rule 7(c) requires that the indictment "shall be a plain, concise and definite written statement of the essential facts constituting the offense charged," the 1966 amendment to Rule 7(f) eliminates the requirement that a defendant seeking a bill of particulars make a showing of "cause." The combined purpose of these rules is to furnish the accused with a sufficient description of the charge against him to enable him to make his defense, *Russell v. United States*, 369 U.S. 749 (1962), and to furnish the accused with further information when necessary to the preparation of his defense and to avoid prejudicial surprise at the trial. *United States v. Smith*, 16 F.R.D. 372 (W.D. Mo. 1954) (cited with approval by the Advisory Committee Note to the 1966 amendment).

In *Will v. United States*, 389 U.S. 90, 98-99 (1967), this Court noted the 1966 amendment to Rule 7(f), and stated

that it intimated "no view regarding the construction of the amendment." 389 U.S. at 98-99, n. 7. But even with respect to the pre-amendment version of the rule which required a showing of "cause," this Court approved the disclosure of the names of "potential witnesses in a bill of particulars, where this information is necessary or useful in the defendant's preparation for trial." 389 U.S. at 99. This Court also approved the petitioner's reason for requiring such disclosure: "not that they will or may be witnesses, but that the defendant requires identification of the times, places and persons present in order to prepare his defense." 389 U.S. at 101. This Court similarly approved the use of a bill of particulars for such purposes in *United States* v. *Debrow*, 346 U.S. 374, 378 (1953). Accordingly, the decision below conflicts with this Court's decisions and underlying policy in the *Will* and *Debrow* cases with respect to the proper interpretation and application of Rule 7(f).

At the same time, the decision below also conflicts with the Second Circuit's interpretation of Rule 7(f) in *United States* v. *O'Connor*, 237 F.2d 466, 475-476 (2nd Cir. 1956), where the Court stated that Rules 7(f), 16 and 17(c) should be "liberally interpreted" to carry out the purpose of enabling the accused "to meet the charges presented against him."

Further, by permitting the government's suppression of the matters requested, including any information with respect to the key prosecution witness's role as a confessed co-conspirator and accomplice, the narrow interpretation of Rule 7(f) in the decision below seriously jeopardizes Sixth Amendment rights of the accused "to be informed of the nature and cause of the accusation" and "to be confronted with the witnesses against him." The underlying policy of the Sixth Amendment and decisions of this court in *Smith* v. *Illinois*, 390 U.S. 129 (1968), *Pointer* v. *Texas*, 380 U.S. 400 (1965), and *Jencks* v. *United States*,

353 U.S. 657 (1957), favor an effective and informed defense in criminal cases which coincides with the purpose of Rule 7(f). Accordingly, it is essential that this Court determine the basic scope of that Rule.

The decision below also conflicts with decisions of this Court and with decisions of other courts of appeals, and calls for the exercise of this Court's supervisory power, with respect to the government's combined pretrial deception and suppression. It misled and deceived the Petitioner by alleging in the indictment that only the Petitioner and his co-defendant committed the substantive offenses in question and that other co-conspirators were "unknown." In fact, however, the government fully intended to use prosecution witness Smith as a confessed accomplice and co-conspirator, who certainly was not "unknown" to the government, and capitalized on this deception by suppressing that and related information, with court approval, in response to the Petitioner's Motion for Particulars.

Such deception and exploitation thereof by the government not only prejudice the accused in his defense, but also taint and threaten the dignity of the court and cause the community to lose faith in the criminal process. Such practices undermine the basic policy of using our system of criminal procedure to find out the truth rather than to secure convictions. See Brennan, *The Criminal Prosecution: Sporting Event Or Quest For Truth?* 1963 Wash. U.L. Rev. 279. The imbalance in capacity for or efficiency of trial preparation between the government and the accused is a further reason to combat such practices. See Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 Yale L.J. 1149 (1960). Accordingly, the decision below conflicts with the basic rationale in *Brady* v. *Maryland*, 373 U.S. 83 (1963), *United States* v. *Maroney*, 319 F.2d 622 (3d Cir. 1963), and *Ashley* v. *Texas*, 319 F.2d 80 (5th Cir. 1963), requiring disclosure of in-

formation useful to the defense and condemning suppression by the government, whether or not the result of guile. See also, Note, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant*, 74 Yale L.J. 136 (1964).

These conflicts and the need for the exercise of this Court's supervisory power justify the grant of certiorari to review the judgment and opinion below.

2. The Decision Below Conflicts With the Decisions of Other Courts of Appeals as to the Trial Court's Failure To Give Any Instructions on the Theory of the Defense.

Although the decision below acknowledges the importance of jury instructions as to the theory of the defense, it approves the trial court's failure to do so by disapproving of the precise form of the Petitioner's and co-defendant's requests for instructions. By the same token, the decision below condones instructions which placed unfair and prejudicial emphasis on evidence favorable to the government while failing to mention evidence favorable to the Petitioner, including portions of documentary evidence introduced by the government itself.

The prejudicial nature of the instructions is apparent from the testimony of prosecution witness Smith. He was the government's principal witness and the only one who linked the Petitioner and co-defendant Leach together in the alleged conspiracy, thereby also making the Petitioner a principal with regard to the substantive counts. Yet his testimony was replete with contradictions and inconsistencies as to what debt was alleged to be missing from the loan application in question; and in fact the application itself (Ex. 1) contained a $14,000 notation representing the purchase price for the property, which was the very obligation which the decision below says was missing. Further,

the trial court instructed the jury that "the evidence showed that this debt and obligation did not appear on the application" (Tr. 5-9), but omitted any mention of the $14,000 notation and the fact that the purchase and sale had not been concluded at the time the application was filled in at the bank.

In this and numerous other ways, the Petitioner was not only deprived of his right to have the theory of the defense clearly stated, but the confusion in the evidence and in the minds of the jury was further compounded, thereby seriously prejudicing the Petitioner.

Accordingly, the decision below conflicts with the law of the Fifth Circuit as enunciated in *Strauss* v. *United States*, 376 F.2d 416, 419 (5th Cir. 1967), to the effect that an accused is entitled to have instructions relating to a theory of defense "for which there is *any foundation* in the evidence," and that the substance rather than the precise form of the proposed charge is important. To the same effect, and also in conflict with the decision below, are *Tatum* v. *United States*, 190 F.2d 612 (D.C. Cir. 1950); *Griego* v. *United States*, 298 F.2d 845 (10th Cir. 1962); *United States* v. *Indian Trailer Corp.*, 226 F.2d 595 (7th Cir. 1955); and *United States* v. *O'Connor*, 237 F.2d 466, 474 (2d Cir. 1956) ("A criminal defendant is entitled to have instructions presented relating to any theory of defense for which there is any foundation in the evidence, no matter how weak or incredible that evidence may be.").

This Court should grant certiorari because of the confusion and discrepancies among the circuits as to the necessity for defense theory instructions, particularly where the trial judge disapproves of the precise form of the requested instructions and decides to give virtually none at all on the theory of the defense. At the same time, this Court should clarify the duty of the trial judge to give balanced instructions, particularly in a case like this where the

evidence is confusing, surprising to the accused, and turns on slippery questions of intent under 18 U.S.C. § 1010.

Finally, the correctness of the decision below is open to serious question with respect to the other matters raised in the Questions Presented which are not argued here at length in order to preserve the brevity of this Petition. The evidence upon which the Petitioner was convicted under 18 U.S.C. § 1010 was so scant and nebulous, that the decision below conflicts with many decisions of other courts of appeals as to the proper interpretation and application of that section. See, e.g., *United States* v. *Heithaus*, 391 F.2d 810 (3d Cir. 1968) (evidence insufficient to sustain conviction under 18 U.S.C. § 1010).

## Conclusion

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the First Circuit.

Respectfully submitted,

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## APPENDIX A

# United States Court of Appeals
## For the First Circuit

No. 7532

UNITED STATES OF AMERICA,

APPELLEE

*v.*

RONALD LEACH,

DEFENDANT, APPELLANT

No. 7533

UNITED STATES OF AMERICA,

APPELLEE

*v.*

JEROME TREMONT,

DEFENDANT, APPELLANT

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*.
McENTEE and COFFIN, *Circuit Judges*.

*Bernard A. Dwork*, with whom *Enid M. Starr* and *Dwork and Goodman* were on brief, for Ronald Leach, appellant.
*James D. St. Clair*, with whom *William E. Bailey* and *Hale and Dorr* were on brief, for Jerome Tremont, appellant.
*Joseph A. Lena*, Assistant United States Attorney, with whom Herbert F. Travers, Jr., United States Attorney, was on brief, for appellee.

June 15, 1970.

McENTEE, *Circuit Judge*. Defendants Tremont and Leach were found guilty of three counts of an indictment charging

violations of 18 U.S.C. §1010[1] by making false statements in an application for a Title I home improvement loan. The charges arose out of a $3,000 loan obtained from the Lynn Safe Deposit and Trust Company in May 1968, purportedly to improve a building the defendants were in the process of buying. Count I charged them with stating in the loan application that the proceeds would be used to improve the property, knowing such representation to be false. Count II charged the making of a false statement by omitting to list an outstanding indebtedness on the FHA credit application as required by law. Count III charged that the defendants, with "divers other persons unknown," had conspired to make false statement for the purposes described as illegal in §1010.

Defendants first contend that there is a fatal variance between the offense charged in count II and the evidence offered by the government. This court charged that in making out the loan application, defendants failed to list a debt owed to Empire Homes, Inc. "to be secured by mortgage," on premises at 13 Pickman St., Salem, Massa-

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[1] "§ 1010. *Federal Housing Administration transactions.*

"Whoever, for the purpose of obtaining any loan or advance of credit from any person, partnership, association, or corporation with the intent that such loan or advance of credit shall be offered to or accepted by the Federal Housing Administration for insurance, or for the purpose of obtaining any extension or renewal of any loan, advance of credit, or mortgage insured by such Administration, or the acceptance, release, or substitution of any security on such a loan, advance of credit, or for the purpose of influencing in any way the action of such Administration, makes, passes, utters, or publishes any statement, knowing the same to be false, or alters, forges, or counterfeits any instrument, paper, or document, or utters, publishes, or passes as true any instrument, paper, or document, knowing it to have been altered, forged, or counterfeited, or willfully overvalues any security, asset, or income, shall be fined not more than $5,000 or imprisoned not more than two years, or both. (June 25, 1948, ch. 645, 62 Stat. 751.)" This statute was amended as of May 25, 1967. Pub. L. 90-19, § 24(c), 81 Stat. 28 transferring the functions and powers previously vested in The Housing and Home Finance Agency to the Department of Housing and Urban Development.

chusetts.[2] At the time the application was made, defendant Tremont had signed a purchase and sale agreement with Empire Homes to buy the Pickman St. property, in which he promised to assume the first mortgage and to take out a second mortgage. Defendants argue that the proof showed that the second mortgagee was one Temkin, not Empire Homes, and that the variance is significant because it confused the witnesses and required the listing of a mortgage indebtedness before the mortgage had come into existence.

This argument is singularly without merit because the debt which the government claims was omitted was not the mortgage but the obligation evidenced by the purchase and sale agreement. The government stated this explicitly in its answer to defendant's motion for a bill of particulars. The FHA form requires not only that mortgages but all "fixed obligations" be listed.

Defendants' next contention, going to the conspiracy count, is that the trial court committed reversible error in denying, in part, their request for a bill of particulars. Count III charged that pursuant to the conspiracy to falsify the application, defendants had committed "the following and other overt acts." Six acts were spelled out in the indictment. Defendants claim they were prejudiced by the denial of their motion to require the government to specify the alleged false statements, the name of the defendant making each statement and, most importantly, the "other overt acts."

The function of a bill of particulars is to protect against jeopardy, provide the accused with sufficient detail of the charges against him where necessary to the preparation of his defense and to avoid prejudical surprise at trial.

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[2] The purchase price was $14,000. The financing was to be accomplished by assuming one mortgage for $11,200 and obtaining a second mortgage for approximately $2,000. On the FHA application the amount "$14,000" was written in as the purchase price but not as a debt.

*United States* v. *Tanner*, 279 F.Supp. 457, 473-74 (N.D. Ill. 1967); *United States* v. *Smith*, 16 F.R.D. 372, 374-75 (W.D. Mo. 1954); 8 J. Moore, Federal Practice ¶7.06[1] (1969). Although the 1966 amendment to Fed. R. Crim. P. 7(f) was intended to liberalize discovery, *Walsh* v. *United States*, 371 F.2d 436 (1st Cir.), *cert. denied*, 387 U.S. 947 (1967), the power to grant or deny particulars is still entrusted to the sound discretion of the trial court. It has long been established that actual prejudice to the defendant must be shown to justify reversal. *Wong Tai* v. *United States*, 273 U.S. 77, 82 (1927); 1 C. Wright, Federal Practice and Procedure §130, at 295 (1969).

Defendants claim they were prejudiced by the testimony of Kenneth Smith, the bank's former loan officer, and the prosecution's chief witness. They claim they had no way of knowing that the government would attempt to show that Smith was part of an ongoing conspiracy tying them into an illegal transaction. In particular, defendants claim they were prejudiced because they were unable to lay a foundation for an attack on Smith's mental capacity.[3]

From our examination of the record we are satisfied that the defendants were not prejudiced by the court's denial of the particulars. First of all, they were well informed by the indictment as to the nature of the charges, the name of the bank, the property involved, pertinent dates and six overt acts. The fact that Smith was a key figure in the transaction and not a secret informer should have alerted the defendants to the likelihood of his being called to testify. It seems to us that normal investigation would have disclosed the further information they required. See *Walsh*, *supra*, at 437. Furthermore, counsel for both defendants subjected Smith to rigorous cross examination. In the

[3] At the time the loan was granted, the FBI were already conducting an investigation and were in the bank. Defendants sought to show that Smith's granting an illegal loan under these circumstances, was not the working of a rational mind.

course of the questioning, they brought out inconsistencies in his testimony and elicited the information that he had a criminal record and that there was then pending a motion for reduction of sentence in two similar cases.

Although it would have been better practice for the court to have granted the motion, *see United States* v. *Covelli*, 210 F.Supp. 589, 590 (N.D. Ill. 1962), we do not find that the defendants were prejudiced by its failure to do so. *United States* v. *Cudia*, 346 F.2d 227, 228 (7th Cir.), *cert. denied*, 382 U.S. 955 (1965). Indeed, our language in *Nesson* v. *United States*, 388 F.2d 603, 604 (1st Cir.), *cert. denied*, 391 U.S. 920 (1968), seems particularly appropriate here:

> "While it would have been better for the government to have disclosed certain record information which might have aided the defendant in his defense, it seems reasonably apparent from an examination of the transcript that the defendant did not avail himself of what information he did have, and was not as surprised as he claims on this appeal."

Defendants also contend that there is a fatal variance between the allegations in count III and the government's proof, in that a conspiracy was charged with "divers unknown persons" at a time when Smith's involvement was known to the government. Aside from the fact that they failed to object and thus did not preserve their rights, this contention seems to be based on a mistaken impression that Smith had testified before the grand jury. Their acknowledgment on oral argument that Smith had not so testified makes further discussion of this point unnecessary.

Defendants also appeal from the denial of their motions for judgment of acquittal and for new trial. In reviewing the denial of a motion for judgment of acquittal, the pertinent question is whether the trial court had reason to

believe that there was sufficient evidence on which reasonable persons could find guilt beyond a reasonable doubt. *Parker* v. *United States*, 378 F.2d 641 (1st Cir.), *cert. denied, Perma-Home Corporation* v. *United States*, 389 U.S. 842 (1967); *Crawford* v. *United States*, 375 F.2d 332, 334 (D.C. Cir. 1967). When we apply this test, and view the evidence most favorably to the government, we conclude that the court below did not err in sending the case to the jury.

Motions for new trial are directed to the trial court's discretion. Under its broad power, the court may weigh the evidence and consider the credibility of the witnesses. The remedy is sparingly used, the courts usually couching their decisions in terms of "exceptional cases," *United States* v. *Pepe*, 209 F.Supp. 592, 595 (D. Del. 1962), *affirmed*, 339 F.2d 264 (3rd Cir. 1964), "miscarriage of justice," *United States* v. *Parelius*, 83 F.Supp. 617, 618 (D. Haw. 1949), and where "the evidence preponderates heavily against the verdict," *United States* v. *Robinson*, 71 F.Supp. 9, 10-11 (D. D.C. 1947). Rule 33 itself provides that the court may grant a new trial where required "in the interest of justice." Applying these standards, we reject the defendants' contentions. Smith testified unequivocally that the defendants wanted to use the money to buy into a business,[4] and that they talked about a job for him. There was also testimony that a portion of the loan money was used to cover an overdrawn checking account. If the jury chose to credit this testimony regarding the purpose of the loan, it was sufficient to sustain the conviction under count I.

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[4] Defendants say that the only testimony to this effect came not from Smith but from the court. After sustaining an objection to a question put by counsel, the court addressed the witness: "They said they wanted the loan to buy into a business, if I understand," to which Smith replied "Right, yes, sir." Although this was a leading question, we cannot agree that it was testimony by the court. At any rate, immediately thereafter, Smith testified fully on the subject, to which no objection was taken.

As to Count II, defendants contend that the government failed to meet its burden of proving that the omission in the FHA form was done with the requisite intent. The offense set forth in §1010 requires proof of three elements: the making of a false statement in the application, knowing it to be false, for the purpose of obtaining a loan from the lending institution and influencing the FHA. *United States v. Pesano*, 293 F.2d 229, 231 (D.C. Cir. 1961). The ingredient of intent must be found in the facts and the surrounding circumstances. *Pesano, supra.* Defendant Leach testified that the reason he left blank the indebtedness portion of the FHA form was that with two mortgages on the property his payments would exceed the rental income and he hoped to consolidate them. Thus the omission was not accidental. When he signed the certification clause that all statements were true he knew that not to be the case. Moreover, count II of the indictment was for failing to disclose his indebtedness, not for failing to list future mortgages. Leach was sufficiently experienced in business affairs (he described himself as a "business broker and consultant") to know that the FHA would have a substantial and legitimate interest in knowing that he had to finance the purchase of the property, whatever his plans to consolidate the mortgages. The jury could find that he deliberately omitted what he knew to be important information so as not to alert the FHA to the true state of affairs. We think the evidence was also sufficient to sustain Tremont's conviction on this count. From the evidence that Tremont had signed the purchase and sale agreement which recited this indebtedness, had put Leach in contact with Smith and was present at the bank when Leach signed the FHA application, the jury could reasonably find that he had the requisite statutory intent.

Defendants point to the fact that even though the indebtedness did not appear on the FHA application, it was

entered by Smith on the bank's own form and placed in the bank's loan folder.[5] They point out also that Smith contradicted himself, testifying first that he may have been told of the debt but failed to write it on the FHA application; and later denying that he had ever been told of the existence of a second mortgage. But whether Smith knew of the indebtedness and whether the information found its way into the hands of the FHA cannot change the result here. For the reasons given above, there was sufficient evidence on which the jury could base its decision regarding the defendant's intentions on the day the application was filled out, and we are not convinced that its decision must be overturned in the interest of justice. Fed. R. Crim. P. 33.

Finally, defendants make numerous allegations of error respecting the failure of the trial court to give requested instructions. These allegations fall into three groups: instructions regarding accomplice testimony; those relative to the charge of making wilful and knowing false statements, and those on conspiracy. As to the first and third groups, defendants candidly admit that the instructions as given were proper, but claim that their rights would have been more adequately protected if their requests had been allowed. We regard these allegations of error to be lacking in substance. Taken as a whole, the charge was fair and impartial. *See Devine* v. *United States*, 403 F.2d 93, 96 (10th Cir. 1968), *cert. denied*, 394 U.S. 1003 (1969); *Harris* v. *United States*, 367 F.2d 633, 636 (1st Cir. 1966), *cert. denied*, 386 U.S. 915 (1967).

Defendants also complain that they were prejudiced by the court's refusal to instruct the jury on the theory of their defense. It is reversible error for the court to refuse a request to instruct as to defendant's theory of the

[5] Smith testified that the bank's form is not sent to the FHA, but that certain information is copied from it onto another document which is then sent to the government.

case if there is evidence to support it. *Belton* v. *United States*, 382 F.2d 150 (D.C. Cir. 1967); *Strauss* v. *United States*, 376 F.2d 416, 419 (5th Cir. 1967); *United States* v. *Blanc*, 375 F.2d 249, 252 (6th Cir.), *cert. denied*, 389 U.S. 835 (1967); *Beck* v. *United States*, 305 F.2d 595 (10th Cir.), *cert. denied*, 371 U.S. 890 (1962); *Marson* v. *United States*, 203 F.2d 904, 912 (6th Cir. 1953); *Calderon* v. *United States*, 279 F. 556, 558 (5th Cir. 1922). 8 J. Moore, Federal Practice §30.06, at 30-4, 30-14 (2nd ed. 1969); 2 C. Wright, Federal Practice and Procedure §482, at 278-79 (1969).

The rule is equally applicable to situations where special facts present an evidentiary theory which if believed would defeat the factual theory of the prosecution. *Salley* v. *United States*, 353 F.2d 897, 898 (D.C. Cir. 1965); *Devine*, *supra*. However, the defendant must tender an instruction that is appropriate in form and substance. *Apel* v. *United States*, 247 F.2d 277, 282 (8th Cir. 1957). Where he fails to accomplish this, the court is not obligated to give an instruction unless a particularly sensitive defense is involved, *Tatum* v. *United States*, 190 F.2d 612 (D.C. Cir. 1951), or the facts adduced at trial are so complex and confusing that an understanding of the issues would be beyond the grasp of the jury. *Apel*, *supra*; *see Heerman* v. *Burke*, 266 F.2d 935, 940 (8th Cir. 1959); *Chicago, N.W. Ry. Co.* v. *Green, Systems, Inc.*, 162 F.2d 779, 783 (2nd Cir. 1947); *E. I. Dupont de Nemours & Co.* v. *Frechette*, 161 F.2d 318, 322 (8th Cir. 1947); *Feldmann* v. *Connecticut Mutual Life Ins. Co.*, 142 F.2d 628, 631 (8th Cir. 1944). By the same token, defendants who are denied their requests must protect their rights as required by Fed. R. Crim. P. 30, except to the extent that a reviewing court may find that the denial constitutes plain error. *McMurray* v. *United States*, 298 F.2d 619 (10th Cir. 1961), *cert. denied*, *Bryson* v. *United States*, 369 U.S. 860 (1962); *Herzog* v. *United*

*States*, 235 F.2d 664 (9th Cir. 1956); 8A J. Moore, Federal Practice ¶52.03[2], at 52-13 (2nd ed. 1969).

Turning to the case at hand, defendants' theory with respect to count I was that at the time they negotiated the loan they intended to make home improvements, but had to postpone their plans because of the failing health of some of the tenants and financial considerations. As to count II, defendant Leach testified that he wanted time in which to attempt a consolidation of the mortgages on the property and, acting on Smith's advice, left the debt portion of the application blank.

The defendants did not request the court to instruct the jury as to their theory on count I. As to count II, certain requests were made but not preserved.[6] Only defendant Leach's request #12, set forth in the margin,[7] is properly before us. In our opinion the court did not err in refusing to give this instruction because it is an incomplete and therefore incorrect statement of the law. *See Apel* v. *United States*, *supra*, at 282; *Lash* v. *United States*, 221 F.2d 237 (1st Cir.), *cert. denied*, 350 U.S. 826 (1955). This requested instruction does not allow for the possibility that Smith

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[6] After the charge was given, the court invited counsel to make their objections. At the close of his own objections, counsel for defendant Tremont said he would also adopt those to be made by the co-defendant. Although defendant Leach preserved his rights as to instruction #12, defendant Tremont had never included a like instruction in his own requests.

Even though Leach's instruction #11 and Tremont's #9 go to their theory of defense to count II, neither defendant made an objection after the charge. *See Dunn* v. *St. Louis-San Francisco Ry.*, 370 F.2d 681 (10th Cir. 1966). Although in a proper case, Fed. R. Crim. P. 52(b) would allow the court to act, there is no plain error here.

We have considered all the other requested instructions which the defendants say were erroneously denied, and find them lacking in merit.

[7] "12. The Defendant Leach is not responsible for any misrepresentations based upon the application by the bank official and if he left the responsibility to the bank official to answer item #8 of the credit application, then he cannot be found guilty under Count II."

was an accomplice or that even though Leach left the "responsibility" for completion of the form up to Smith, he fully intended to violate the law. A court is under no compulsion to accept faulty instructions.

Although we are fully cognizant of the importance of theory instructions, we think the primary responsibility must rest with counsel to make full and fair requests to charge. On the facts of this case the jury was sufficiently apprised by the court's instructions on intent and accomplice testimony to judge the conflicting evidence and make its determination as to the guilt or innocence of the defendants.

*Affirmed.*

## APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 7533.

UNITED STATES OF AMERICA,
APPELLEE,
*v.*
JEROME TREMONT,
DEFENDANT, APPELLANT.

### JUDGMENT

Entered: June 15, 1970

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:
(s) DANA H. GALLUP
*Clerk.*

[cc: Messrs. St. Clair and Lena.]